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MEETING DOCUMENT

From:	European Commission
To:	Trade Policy Committee (Deputies)
Subject:	FTA negotiations with Indonesia and the Philippines - Initial negotiating texts on the Rules of Procedure and the Code of Conduct to be annexed to the initial negotiating text on dispute settlement



EUROPEAN COMMISSION
Directorate-General for Trade

Directorate C - Asia and Latin America
South and South East Asia, Australia, New Zealand

Brussels, 16 May 2018

*Limited*¹

NOTE FOR THE ATTENTION OF THE TRADE POLICY COMMITTEE

SUBJECT: *FTA negotiations with Indonesia and the Philippines - Initial negotiating texts on the Rules of Procedure and the Code of Conduct to be annexed to the initial negotiating text on dispute settlement*

ORIGIN: Commission DG Trade Unit C.2



OBJECTIVE: *For information*

REMARKS:

Delegations will find attached the draft EU textual proposals for the EU-Indonesia and EU-Philippines free trade agreement ("FTA") covering the Rules of Procedures and the Code of Conduct related to the negotiating chapter of dispute settlement.

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The Commission intends to submit the text to the Indonesian side ahead of the next round of negotiations.

The text is also to be used for the EU-Philippines FTA, although no date has for the moment been fixed for the third round of negotiations with this country.

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CHAPTER [XX]

DISPUTE SETTLEMENT

ANNEX [X]

RULES OF PROCEDURE

I. Definitions

1. In Chapter [X] (Dispute Settlement) and in this Annex:
 - (a) “administrative staff”, in respect of a panellist, means individuals under the direction and control of a panellist, other than assistants;
 - (b) “adviser” means an individual retained by a Party to advise or assist that Party in connection with the panel proceedings;
 - (c) “assistant” means an individual who, under the terms of appointment and under the direction and control of a panellist, conducts research or provides assistance to that panellist;
 - (d) “complaining Party” means any Party that requests the establishment of panel under Article X.4 (Initiation of Panel Procedures);
 - (e) “day” means a calendar day;
 - (f) “panel” means a panel established under Article X.5 (Establishment of a Panel);
 - (g) “panellist” means a member of a panel;
 - (h) “Party complained against” means the Party that is alleged to be in violation of the covered provisions;
 - (i) “representative of a Party” means an employee or any individual appointed by a government department, agency, or any other public entity of a Party who represents the Party for the purposes of a dispute under this Agreement.

II. Notifications

2. Any request, notice, written submission or other document of:
 - (a) the panel shall be sent to both Parties at the same time;

- (b) a Party which is addressed to the panel shall be copied to the other Party at the same time; and
 - (c) a Party which is addressed to the other Party shall be copied to the panel at the same time, as appropriate.
3. Any notification referred to under rule 2 of this Annex shall be made by e-mail or, where appropriate, any other means of telecommunication that provides a record of the sending thereof. Unless proven otherwise, such notification shall be deemed to be delivered on the date of its sending.
 4. All notifications shall be addressed to the Directorate-General for Trade of the European Commission and to [...] of [the Philippines/Indonesia], respectively.
 5. Minor errors of a clerical nature in a request, notice, written submission or other document related to the panel proceedings may be corrected by delivery of a new document clearly indicating the changes.
 6. If the last day for delivery of a document falls on an official holiday of the European Commission or of [the Philippines/Indonesia] the document shall be deemed delivered on the next business day.

III. Appointment of Panellists

7. If pursuant to Article X.5 (Establishment of a Panel), a panellist is selected by lot, the co-chair of the [institutional body to be defined] of the complaining Party shall promptly inform the co-chair of the Party complained against of the date, time and venue of the lot. The Party complained against may, if it so chooses, be present during the lot. In any event, the lot shall be carried out with the Party or Parties that are present.
8. The co-chair of the complaining Party shall notify, in writing, each individual who has been selected to serve as a panellist of his or her appointment. Each individual shall confirm his or her availability to both Parties within five days from the date on which he or she was informed of his or her appointment.
9. The co-chair of the [institutional body to be defined] of the complaining Party shall select by lot the panellist, within five days from the request referred to in paragraph 4 of Article X.5 (Establishment of a Panel), if any of the sub-lists referred in paragraph 1 of Article X.6 (Lists of Panellists):
 - (a) is not established, amongst those individuals who have been formally proposed by one or both Parties for the establishment of that particular sub-list; or
 - (b) does not contain any longer at least five individuals, amongst those individuals who remain on that particular sub-list.

IV. Organisational Meeting

10. Unless the Parties agree otherwise, they shall meet the panel within seven days of its establishment in order to determine such matters that the Parties or the panel deem appropriate, including:
- (a) the remuneration and expenses to be paid to the panellists, which shall be in accordance with WTO standards;
 - (b) the remuneration to be paid to assistants. The total amount of the remuneration of an assistant or assistants of each panellist shall not exceed 50% of the remuneration of that panellists; and
 - (c) the timetable of the proceedings.

Panellists and representatives of the Parties may take part in this meeting via telephone or video conference.

V. Written Submissions

11. The complaining Party shall deliver its written submission no later than 20 days after the date of establishment of the panel. The Party complained against shall deliver its written submission no later than 20 days after the date of delivery of the written submission of the complaining Party.

VI. Operation of the Panel

12. The chairperson of the panel shall preside at all its meetings. The panel may delegate to the chairperson the authority to make administrative and procedural decisions.
13. Unless otherwise provided in Chapter [X] (Dispute Settlement) or in this Annex, the panel may conduct its activities by any means, including telephone, facsimile transmissions or computer links.
14. Only panellists may take part in the deliberations of the panel, but the panel may permit their assistants to be present at its deliberations.
15. The drafting of any decision and report shall remain the exclusive responsibility of the panel and shall not be delegated.
16. Where a procedural question arises that is not covered by the Chapter [X] (Dispute Settlement) and its Annexes, the panel, after consulting the Parties, may adopt an appropriate procedure that is compatible with those provisions.
17. When the panel considers that there is a need to modify any of the time periods for the proceedings other than the time periods set out in Chapter [X] (Dispute Settlement) or to make any other procedural or administrative adjustment, it shall inform the Parties, in writing and after consultation of the Parties, of the reasons for the change or adjustment and of the time period or adjustment needed.

VII. Replacement

18. When a Party considers that a panellist does not comply with the requirements of Annex [XX] (Code of Conduct for Panellists and Mediators) and for this reason should be replaced, that Party shall notify the other Party within 15 days from the time at which it obtained sufficient evidence of the panellist's alleged failure to comply with the requirements of Annex [XX] (Code of Conduct for Panellists and Mediators).
19. The Parties shall consult within 15 days. They shall inform the panellist of its alleged failure and they may request the panellist to take steps to ameliorate the failure. They may also, if they so agree, remove the panellist and select a new panellist in accordance with Article X.5 (Establishment of a Panel).
20. If the Parties fail to agree on the need to replace the panellist, other than the chairperson of the panel, either Party may request that this matter be referred to the chairperson of the panel, whose decision shall be final.

If the chairperson of the panel finds that the panellist does not comply with the requirements of Annex [XX] (Code of Conduct for Panellists and Mediators), the new panellist shall be selected in accordance with Article X.5 (Establishment of a Panel).

21. If the Parties fail to agree on the need to replace the chairperson, either Party may request that this matter be referred to one of the remaining members of the pool of individuals from the sub-list of chairpersons established under Article X.6 (Lists of Panellists). His or her name shall be selected by lot by the co-chair of the [institutional body to be defined] from the requesting Party, or the chair's delegate. The decision by the selected person on the need to replace the chairperson shall be final.

If this person finds that the chairperson does not comply with the requirements of Annex [XX] (Code of Conduct for Panellists and Mediators), the new chairperson shall be selected in accordance with Article X.5 (Establishment of a Panel) of Chapter [X] (Dispute Settlement).

VIII. Hearings

22. Based upon the timetable determined pursuant to rule 10 of this Annex, after consulting with the Parties and the other panellists, the chairperson of the panel shall notify the Parties the date, time and venue of the hearing. This information shall be made publicly available by the Party in which the hearing takes place, unless the hearing is closed to the public.
23. Unless the Parties agree otherwise, the hearing shall be held in Brussels if the complaining Party is [the Philippines/Indonesia] and in [...] if the complaining Party is the Union. The Party complained against shall bear the expenses derived from the logistical administration of the hearing.
24. The panel may convene additional hearings if the Parties so agree.

25. All panellists shall be present during the entirety of the hearing.
26. Unless the Parties agree otherwise, the following persons may attend the hearing, irrespective of whether the hearing is open to the public or not:
 - (a) representatives of a Party;
 - (b) advisers;
 - (c) assistants and administrative staff;
 - (d) interpreters, translators and court reporters of the panel; and
 - (e) experts, as decided by the panel pursuant to paragraph 2 of Article X.21 (Receipt of Information).
27. No later than five days before the date of a hearing, each Party shall deliver to the panel and to the other Party a list of the names of persons who will make oral arguments or presentations at the hearing on behalf of that Party and of other representatives and advisers who will be attending the hearing.
28. The panel shall conduct the hearing in the following manner, ensuring that the complaining Party and the Party complained against are afforded equal time in both argument and rebuttal argument:

Argument

 - (a) argument of the complaining Party;
 - (b) argument of the Party complained against.

Rebuttal Argument

 - (a) reply of the complaining Party;
 - (b) counter-reply of the Party complained against.
29. The panel may direct questions to either Party at any time during the hearing.
30. The panel shall arrange for a transcript of the hearing to be prepared and delivered to the Parties as soon as possible after the hearing. The Parties may comment on the transcript and the panel may consider those comments.
31. Each Party may deliver a supplementary written submission concerning any matter that arose during the hearing within ten days after the date of the hearing.

IX. Questions in Writing

32. The panel may at any time during the proceedings submit questions in writing to one or both Parties. Any questions submitted to one Party shall be copied to the other Party.
33. Each Party shall provide the other Party with a copy of its responses to the questions submitted by the panel. The other Party shall have an opportunity to provide comments in writing on the Party's responses within five days after the delivery of such copy.

X. Confidentiality

34. Each Party and the panel shall treat as confidential any information submitted by the other Party to the panel that the other Party has designated as confidential. When a Party submits to the panel a written submission which contains confidential information, it shall also provide, within fifteen days, a submission without the confidential information and which can be disclosed to the public.
35. Nothing in this Annex shall preclude a Party from disclosing statements of its own positions to the public to the extent that, when making reference to information submitted by the other Party, it does not disclose any information designated by the other Party as confidential.
36. The panel shall meet in closed session when the submission and arguments of a Party contains business confidential information. The Parties shall maintain the confidentiality of the panel hearings when the hearings are held in closed session.

XI. Ex Parte Contacts

37. The panel shall not meet or communicate with a Party in the absence of the other Party.
38. A panellist shall not discuss any aspect of the subject matter of the proceedings with one Party or both Parties in the absence of the other panellists.

XII. Amicus Curiae Submissions

39. Unless the Parties agree otherwise within five days of the date of the establishment of the panel, the panel may receive unsolicited written submissions from natural persons of a Party or legal persons established in the territory of a Party who are independent from the governments of the Parties, provided that they:
 - (a) are received by the panel within ten days of the date of the establishment of the panel;
 - (b) are concise and in no case longer than fifteen pages, including any annexes, typed at double space;
 - (c) are directly relevant to a factual or a legal issue under consideration by the panel;
 - (d) contain a description of the person making the submission, including for a natural person his or her nationality and for a legal person its place of establishment, the

nature of its activities, its legal status, its general objectives and its source of financing;

- (f) specify the nature of the interest that the person has in the panel proceedings; and
 - (g) are drafted in the languages chosen by the Parties in accordance with rules 43 and 44 of this Annex.
40. The submissions shall be delivered to the Parties for their comments. The Parties may submit comments to the panel within ten days of the delivery.
41. The panel shall list in its report all the submissions it has received pursuant to rule 39 of this Annex. The panel shall not be obliged to address in its report the arguments made in such submissions, however, if it does, it shall also take into account any comments made by the Parties pursuant to rule 40 of this Annex.

XIII. Urgent Cases

42. In cases of urgency referred to in Article X.10 (Decision on Urgency), the panel, after consulting the Parties, shall adjust the time periods referred to in this Annex as appropriate. The panel shall notify the Parties of such adjustments.

XIV. Translation and interpretation

43. During the consultations referred to in Article X.3 (Consultations), and no later than the meeting referred to in rule 10 of this Annex, the Parties shall endeavour to agree on a common working language for the proceedings before the panel.
44. If the Parties are unable to agree on a common working language, each Party shall make its written submissions in its chosen language. Each Party shall provide at the same time a translation in the language chosen by the other Party, unless its submissions are written in one of the working languages of the WTO. The Party complained against shall arrange for the interpretation of oral submissions into the languages chosen by the Parties.
45. Panel reports and decisions shall be issued in the language or languages chosen by the Parties. If the Parties have not agreed on a common working language, the interim and final report of the panel shall be issued in one of the working languages of the WTO.
46. Any Party may provide comments on the accuracy of the translation of any translated version of a document drawn up in accordance with this Annex.
47. Each Party shall bear the costs of the translation of its written submissions. Any costs incurred for translation of a ruling shall be borne equally by the Parties.

XV. Other Procedures

48. The time periods laid down in this Annex shall be adjusted in line with the special time periods provided for the adoption of a report or decision by the panel in the proceedings under Article X.14 (Reasonable Period of Time), Article X.15 (Compliance Review), Article X.16 (Temporary Remedies) and Article X.17 (Review of Any Measure Taken to Comply after the Adoption of Temporary Remedies).

ANNEX [XX]

CODE OF CONDUCT FOR PANELLISTS AND MEDIATORS

I. Definitions

1. In this Annex:
 - (a) “administrative staff” means, in respect of a panellist, individuals under the direction and control of a panellist, other than assistants;
 - (b) “assistant” means an individual who, under the terms of appointment of a panellist, conducts research or provides assistance to that panellist;
 - (c) “candidate” means an individual whose name is on the list of panellists referred to in Article X.6 (Lists of Panellists) and who is under consideration for selection as a panellist under Article X.5 (Establishment of a Panel);
 - (d) “mediator” means an individual who has been selected as mediator in accordance with Article X.28 (Selection of the Mediator);
 - (e) “panellist” means a member of a panel.

II. Governing Principles

2. In order to preserve the integrity and impartiality of the dispute settlement mechanism, each candidate and panellist shall:
 - (a) get acquainted with this Annex;
 - (b) be independent and impartial;
 - (c) avoid direct or indirect conflicts of interests;
 - (d) avoid impropriety and the appearance of impropriety or bias;
 - (e) observe high standards of conduct; and
 - (f) not be influenced by self-interest, outside pressure, political considerations, public clamour, and loyalty to a Party or fear of criticism.
3. A panellist shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties.
4. A panellist shall not use his or her position on the panel to advance any personal or private interests. A panellist shall avoid actions that may create the impression that others are in a special position to influence him or her.

5. A panellist shall not allow past or existing financial, business, professional, personal, or social relationships or responsibilities to influence his or her conduct or judgement.
6. A panellist shall avoid entering into any relationship or acquiring any financial interest that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or bias.

III. Disclosure Obligations

7. Prior to the acceptance of his or her appointment as a panellist under Article X.5 (Establishment of a Panel), a candidate requested to serve as a panellist shall disclose any interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceedings. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters, including financial interests, professional interests, or employment or family interests.
8. The disclosure obligation under paragraph 7 is a continuing duty which requires a panellist to disclose any such interests, relationships or matters that may arise during any stage of the proceedings.
9. A candidate or a panellist shall communicate to the [institutional body to be defined] for consideration by the Parties any matters concerning actual or potential violations of this Annex at the earliest time he or she becomes aware of them.

IV. Duties of Panellists

10. Upon acceptance of his or her appointment, a panellist shall be available to perform and shall perform his or her duties thoroughly and expeditiously throughout the proceedings, and with fairness and diligence.
11. A panellist shall consider only the issues that are raised in the proceedings and that are necessary for a decision and shall not delegate this duty to any other person.
12. A panellist shall take all appropriate steps to ensure that his or her assistants and administrative staff are aware of, and comply with, the obligations incurred by panellists under Parts II, III, IV and VI of this Annex.

V. Obligations of Former Panellists

13. Each former panellist shall avoid actions that may create the appearance that he or she was biased in carrying out the duties or that he or she derived advantage from the decision of the panel.
14. Each former panellist shall comply with the obligations in Part VI of this Annex.

VI. Confidentiality

15. A panellist shall not, at any time, disclose any non-public information concerning the proceedings or acquired during the proceedings for which he or she has been appointed. A panellist shall not, in any case, disclose or use such information to gain personal advantage or advantage for others or to adversely affect the interest of others.
16. A panellist shall not disclose a decision of the panel or parts thereof prior to its publication in accordance with Chapter [X] (Dispute Settlement).
17. A panellist shall not, at any time, disclose the deliberations of a panel, or any panellist's view, nor make any statements on the proceedings for which he or she has been appointed or on the issues in dispute in the proceedings.

VII. Expenses

18. Each panellist shall keep a record and render a final account of the time devoted to the proceedings and of his or her expenses, as well as the time and expenses of his or her assistants and administrative staff.

VIII. Mediators

19. This Annex shall apply to mediators, *mutatis mutandis*.